

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION**

AMERICAN WHITEWATER, et al
Plaintiffs,

V.

THOMAS TIDWELL, in his official capacity as
Chief of the United States Forest Service; et al

Defendants.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

Civil Action No 8:09-cv-02665

I am filing the attached document related to this matter:

AFFIDAVIT OF DONALD E. KINSER

DATED: October 15, 2009

NELSON GALBREATH, LLC

s/ J. Nathan Galbreath

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

AMERICAN WHITEWATER, AMERICAN CANOE)
ASSOCIATION, GEORGIA CANOEING)
ASSOCIATION, ATLANTA WHITEWATER CLUB,)
WESTERN CAROLINA PADDLERS, FOOTHILLS)
PADDLING CLUB, Joseph C. STUBBS, Kenneth L.)
STRICKLAND, and Bruce A. HARE,)
)
Plaintiffs,) Civil Action No.
v.)
)
THOMAS TIDWELL, in his official capacity as Chief)
of the United States Forest Service; the UNITED)
STATES FOREST SERVICE, an agency of the United)
States Department of Agriculture; ELIZABETH)
AGPAOA, Regional Forester, Southern Region, United)
States Forest Service; MONICA J. SCHWALBACH,)
Acting Forest Supervisor, Francis Marion and Sumter)
National Forests; MARISUE HILLIARD, Forest)
Supervisor, National Forests in North Carolina;)
GEORGE M. BAIN, Forest Supervisor,)
Chattahoochee-Oconee National Forests; THOMAS)
VILSACK, in his official capacity as Secretary of the)
United States Department of Agriculture; the UNITED)
STATES DEPARTMENT OF AGRICULTURE,)
)
Defendants.

AFFIDAVIT OF DONALD E. KINSER

1. “BEFORE ME, the undersigned authority, on this day personally appeared Donald E. Kinser, being by me duly sworn, deposed as follows:

2. My name is Don Kinser. I am a member of American Whitewater’s Board of Directors and currently serve as President. I am also a “Chattooga River Regional Coordinator” for American Whitewater, which means that I am a point person for the organization on all

issues related to the Chattooga Wild and Scenic River. I own a home in Long Creek, South Carolina, which shares a property boundary with the Chattooga Wild and Scenic River corridor. I am also the Chairman of my own technology firm, EDI, Ltd, which operates out of Atlanta, Georgia.

3. The area of the Chattooga above the Highway 28 bridge is commonly known as the "Headwaters," and there are nearly twenty-two floatable river miles between the Grimshawes Bridge and the Highway 28 Bridge.

4. I have been personally and intimately involved in the effort to restore hand-powered boating access ("floating") on the Headwaters since 1997.

5. To the best of my knowledge, the Headwaters represent the only section of river in the entire region, managed by the United States Forest Service (the "USFS"), where floating is banned.

6. In 1971, the USFS conducted a study to determine whether the Chattooga Wild and Scenic River was suitable for inclusion in the fledgling National Wild and Scenic Rivers System (the "1971 Study"). A copy of the 1971 Study is attached hereto as **Exhibit 1**.

7. On February 25, 2004, American Whitewater served a Freedom of Information Act Request on the United States Forest Service (the "Request") requesting:

1. Copies of any documents or records (including memoranda, correspondence, studies and planning documents) prepared or obtained by the United States Forest Service (USFS) or United States Department of Agriculture (USDA) between 1969 and the present, which contain any reference to "whitewater recreation", "floating", "boating", "canoeing", and/or "kayaking" on the Chattooga River upstream of Highway 28.
 - a. Note that this river segment upstream of Highway 28 is often referred to as "Section 1" or uncommonly as "Section 0" in USFS documents and that the floating public often

- refers to this river section as “Section 0”, “Section 00”, or “Section I”.
- b. Note that this river segment is located in part in Nantahala National Forest in North Carolina, passes through the Ellicott Rock Wilderness, and separates the Chattahoochee National Forest in Georgia and Sumter National Forest in South Carolina (which manages the Wild and Scenic sections of the Chattooga).
 - c. Note that regulation 36 CFR 261.77.c may reference this subject, and that we are also interested in this regulation per requested item #3 below.
 - d. Note that “Appendix M” of the Sumter National Forest’s Chattooga River Wild and Scenic River Management Plan references floating on this section of river, and that we are also interested in Appendix M per requested item #3 below.
 - e. Note that floating use was addressed in the 1971 Chattooga Wild and Scenic River study document submitted to Congress. The study was done to support designation of the Chattooga as a Wild and Scenic River.
 - f. Note that on May 10, 1974 Congress identified 57 miles of the Chattooga River for inclusion in the National Wild and Scenic River System.
 - g. Note that numerous individuals and public interest non-profits, including American Whitewater, have expressed written interest since the mid-1970’s in the policy question of why this river section was closed to float use and how the Forest Service has developed policy addressing public requests to reopen boating and recreation upstream of Highway 28.
 - h. Note that former Superintendent Forest Supervisor Donald W. Eng prohibited floating north of SC/GA Highway 28 in 1981 for public safety purposes at the same time he required the use of safety equipment such as helmets and life jackets on the lower sections of the river [Appendix M, pg 32, 1985 Land and Resources Management Plan (LRMP) for this letter and a comment of the effect of this decision on safety on Appendix M, page 20, part III, subsection H). Note that the ban was reaffirmed in the 1985 LRMP. As in 1981, the LRMP limited floating to Sections I, II, III, & IV in the Sumter and Chattahoochee National Forests. However, no mention of safety was made in regard to the boating ban; instead, the ban was described as a tool for providing “quality trout fishing.” Under Appendix M, page 16, part III, subsection C of the 1985 LRMP.

- i. Note that boaters who floated the Wild and Scenic Chattooga River recall floating the sections upstream of Highway 28 legally prior to 1976 or 1977 and the decision to ban floating upstream of Highway 28 was apparently made prior to the 1981 decision described above and documented in the 1985 LRMP. We are seeking documentation dating prior to 1985 of this initial policy decision limiting use upstream of Highway 28.
2. Copies of any documents or records (including memoranda, correspondence, studies and planning documents) prepared or obtained by the United States Forest Service (USFS) or United States Department of Agriculture (USDA) since 1990, which contain any reference to USFS Policy on limiting non-commercial recreational boating, floating, or other whitewater recreation on Wild & Scenic Rivers, and the Chattooga River in particular, under the Wild and Scenic Rivers Act (P.L. 90-542.1.b).
 - a. Note that there may have been relevant policy discussions re limiting use on the Wild & Scenic North Fork of the Kern River in California's Sequoia National Forest.
3. Copies of any documents or records (including memoranda, correspondence, studies and planning documents) prepared or obtained by the United States Forest Service (USFS) or United States Department of Agriculture (USDA) between 1974 and the present, which contain (1) any reference to USFS policy or actions under 36 CFR 261.77.c, and/or also (2) any reference to USFS Policy regarding development or amendment of Appendix M of the Chattooga River Management Plan re recreational boating use upstream of Highway 28.
 - a. Note that Appendix M states "Floating north of Highway 28 Bridge is prohibited through a condition of the floater permit under 36 CFR 261.77.c."; and that
 - b. 36 CFR 261.77.c provides the apparent legal foundation for the prohibition on boating in the headwaters by simply detailing that visitors must sign a self registration floater permit before boating, and that the permit will be made available at specified locations including the Highway 28 Bridge; but that
 - c. The actual decision to limit all float use above Highway 28, or neglect of issuing permits for non-commercial float use above Highway 28, does not appear to have been detailed in the public record and that the intent of our request is to reveal how this policy decision was made, who made it, and whether it was consistent with NEPA, the Wild and

Scenic Rivers Act, and other relevant legislation, or whether the decision was simply made through an error of omission and could be rectified through the issuance of float use permits consistent with 36 CFR 261.77.c.

4. Copies of any documents or records (including memoranda, correspondence, studies and planning documents) prepared or obtained by the United States Forest Service (USFS) or United States Department of Agriculture (USDA) between 1969 and the present, which contain any reference to USFS Policy regarding Section 13.a of the Wild & Scenic Rivers Act, which states in part “Nothing in this Act shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area”; and also any which contain reference to Section 13.a in relation to the State of Georgia, South Carolina, and/or North Carolina on the navigability of the Chattooga River.
 - a. The intent of this request is to reveal any documentation that the Forest Service has available on the legal navigable status of the Chattooga River and how Section 13.a applies specifically to the Chattooga River; and
 - b. To reveal any documentation on management policy re navigation management or ownership claims between the Forest Service and the States bordering the Wild & Scenic Chattooga River; and
 - c. To reveal any documentation on management policy re Forest Service limitations and/or controls of recreational navigation on the Chattooga River upstream of Highway 28, and Section III and IV.

All documents attached hereto, except where otherwise noted, are true and correct copies of documents obtained from the USFS pursuant to this Request.

8. The Headwaters have been closed to floating since the 1976 Chattooga Wild & Scenic River Classifications, Boundaries and Development Plan (published in the Federal Register, Vol 41, No 56 Monday March 22, 1976) (the “1976 Plan”) imposed a total Headwaters floating ban, as described in *Chattooga! A Case Study of Wild and Scenic River Management*

Problems by Carol Townsend, April 23, 1980, a true and correct copy of which is attached hereto as **Exhibit 2**. The Headwaters are among the most desirable floating areas in the nation.

9. The 1976 Plan, and two subsequent plans, the “1985 Plan,” and the “2004 Plan,” each prohibited floating the Headwaters. A true and correct copy of each of these plans is attached hereto as **Exhibit 3, Exhibit 4, and Exhibit 5**, respectively (the 2004 Plan was obtained from the USFS website on May 14, 2006 at the following address:

<http://www.fs.fed.us/r8/fms/forest/projects/plan.pdf>).

10. There are less than a handful of opportunities to float long, continuous Class I-V whitewater in the entire United States, and to the best of my knowledge, the Chattooga is the only multi-day opportunity in the Southeast.

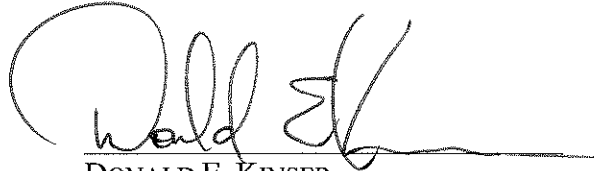
11. On April 15, 2004, American Whitewater, on behalf of its members, including Plaintiffs Joe Stubbs, Ken Strickland, and Bruce Hare, filed an administrative appeal of the 2004 Plan, as described in the Notice of Appeal, a true and correct copy of which is attached hereto as **Exhibit 6**. (Appeal #04-13-00-0026).

12. On April 28, 2005, Gloria Manning issued a Decision for Appeal on matter 04-13-00-0026, American Whitewater’s challenge of the Sumter National Forest Land and Resource Management Plan Revision, a true and correct copy of which is attached hereto as **Exhibit 7**.

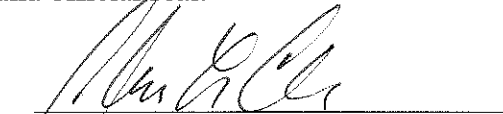
13. In 2004, archaeologists dug up a 250-year old pirogue from the Chattooga River, as described in the article by Jason Sacher, *Rare canoe to be dug up in Oconee*. See the Greenville News story at <http://greenvilleonline.com/news/2004/04/28/2004042830215.htm> (posted on April 28, 2004, visited on May 12, 2006), a true and correct copy of which is attached hereto as **Exhibit 8**.

14. A true and correct copy of the Sumter National Forest's *Record of Decision: Final Environmental Impact Statement/Revised Land and Resource Management Plan* (January 2004), is attached hereto as **Exhibit 9**.

Further, Affiant sayeth not."


DONALD E. KINSER

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this 13 day of October, 2009, to certify which witness my hand and official seal.


Notary Public in and for
the State of Georgia

My Commission Expires:

22-July-2012

